

Dear colleague,

ESFA-funded Independent Learning Providers providing education and training to children of compulsory school age

This letter is about a legal issue and requires your **urgent attention**.

We would like to understand whether your organisation is providing education and training to children of compulsory school age and whether you are operating an unregistered independent school. You will need to include any provision that you subcontract to another organisation for this age group in the assessment we ask you to make. Please **complete the form in Annex A and send to Unregulated.SCHOOLRESPONSE@education.gov.uk by 24th June 2019**.

We have provided further information and advice on how to assess your organisation below. Please respond to confirm:

- if you believe your organisation is operating as an unregistered school and the steps that will / have been taken to become compliant, or
- your organisation is not affected.

This is a necessarily technical communication about a detailed legal issue and compliance with the law. We have provided links to the information you will need help you in your assessment of your organisation. If necessary, you may want to seek your own legal advice.

This organisation has been identified as one of a number of Independent Learning Providers (ILPs) that has recorded some children of compulsory school age on either your 2016/17 R14, 2017/18 R14, or 2018/19 R06 Individualised Learner Record (ILR) return.

We are writing to ensure you are aware of the legal position in respect of compulsory school age children studying with ILPs. ILPs are required to register with the Department for Education (DfE) that they are running an independent school if they meet the definition of an independent school set out in law. Guidance is provided in relation to the definition and the process of registration in the departmental advice to be found via the link below:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/492259/Registration_of_independent_schools.pdf

Those responsible for running an ILP that meets the definition of an independent school that is not registered as such would be committing an offence (under section 96 of the Education and Skills Act 2008 - "the 2008 Act") and may be liable to prosecution.

Ofsted is not able to inspect the quality of education provided by ILPs to compulsory school age children that are not also registered independent schools. However, Ofsted has powers, under section 97 of the 2008 Act, to inspect any setting it has reasonable cause to believe is operating as an unregistered independent school. This power enables Ofsted to collect evidence to support a prosecution under section 96 of the 2008 Act.

An institution will meet the definition of an “independent school”, and should therefore be registered as such if it meets the following criteria:

- It is a school (which broadly speaking means any educational institution for providing primary and/or secondary education, even if it provides further education) at which full time education is provided for (a) five or more pupils of compulsory school age, or (b) one or more such pupils with an EHC plan or a statement of special educational needs or who is “looked after” by the local authority, and is not a school maintained by a local authority or a non-maintained special school.
- There is no legal definition of ‘full time’. However, we would consider an institution to be providing full-time education if it is intended to provide, or does provide, all, or substantially all, of a child’s education. Generally, we consider any institution that is operating during the day, for more than 18 hours per week, to be providing full-time education.

According to our records, your institution is not registered as an independent school. If you believe your institution meets the criteria of an independent school, you must register it with the department as an independent school or alternatively make other arrangements for these students at a compliant organisation away from your institution or otherwise cease to be an independent school as soon as possible. This may mean contacting your local authority if it has commissioned and funded the places for these learners.

The DfE cannot endorse providers operating in breach of the law. Further information on what settings must register, and how to go about securing registration, can be found in the above registration guidance document or by emailing registration.enquiries@education.gov.uk

Subcontracted Provision

The issues set out in this letter apply to all the provision for students of compulsory school age enrolled with you i.e. both directly delivered and subcontracted provision.

Subcontracting Arrangements and Pupil Registration

You should be aware that a school must not register someone as a pupil while subcontracting for that person’s whole programme. This is because schools must comply with the Education (Pupil Registration) (England) Regulations 2006 (“the 2006 Regulations”) and the underlying primary legislation, which requires schools to maintain a register of all pupils at the school. These regulations cover all pupils at the school (irrespective of age). Only pupils at the school can be added to a school’s roll. Section 3 of the Education Act 1996 defines a pupil as someone “for whom education is being provided at the school”.

Legally, being a pupil and attending a school are based on physical presence. Although a school has powers to arrange some educational activities away from their premises, allowing the whole of a pupil’s education to be delivered somewhere, and by someone, other than the school means that individual is not a pupil or attending the school. Therefore, such individuals should not be registered as pupils at that school.

Schools can therefore only subcontract provision for pupils who:

- attend the institution for at least one element of their programme throughout the academic year; and
- attend the school at least once a week

If you meet the definition of a school, the 2006 Regulations will apply to your institution. These regulations will apply in connection to all subcontracted provision in place at the time of registration (not just new provision made after registration).

Students aged 19 to 25 with an Education Health and Care Plan

If you seek registration as an independent school, you should be aware that the School and Early Years Funding (England) (No 2) Regulations 2018, which set out how a local authority may spend its education budget, prohibit a local authority from using its high needs budget to fund places, or pay top-up funding, for 19 to 25 year-olds attending an independent school. If you currently have any students aged 19 to 25 with an EHC plan you should work with the placing Local Authority to identify a suitable alternative provider for them and ensure that they are enrolled with that institution prior to completing your registration as an independent school.

What we require you to confirm

I would urge you to confirm by 24th June 2019 if:

- You are of the view that your provision to 14-16 year-olds does not bring your institution within the definition of an independent school
- You are of the view that your institution does meet the definition of an independent school, but is not currently registered as such and which of the following actions you will be taking:
 - I. you intend to seek registration as an independent school;
 - II. you will be making alternative arrangements for your 14-16 cohort; or
 - III. you intend to make arrangements in relation to your 14-16 cohort so as to cease to be an independent school. This might be by, for example, reducing the length of the weekly hours of attendance or by reducing the total number of students aged 14-16 to below 5.

We require you to indicate what those arrangements are and the timescale in which you will be making those arrangements. In addition, if you will be seeking to regularise the position by registering your institution as an independent school, we expect you to commence that process as soon as possible

On the basis of our current arrangements with Ofsted regarding unregistered independent schools, absent any features that point to it being appropriate to act more quickly or differently (for example a risk to the welfare of children), we would not ordinarily expect a case against an ILP to be referred to the CPS for prosecution for the section 96 offence unless a number of steps had first been taken.

Firstly, an inspection by Ofsted of the institution concerned which concluded that there was an unregistered independent school being conducted, Ofsted advising the Department subsequent to that inspection that it considers that there has been the commission of the offence under section 96 of the 2008 Act, and then it subsequently being discovered that the institution was still being operated unlawfully, contrary to section 96.

Any cases considered for referral to the CPS for prosecution will be subject to a rigorous decision-making process which considers each case. Prosecutions require the consent of the Secretary of State to proceed. It would be a significant factor against proceeding with a prosecution if an ILP had taken effective steps, quickly, to regularise its position – for example, by pursuing in good faith an application to register or by putting plans in place, and implementing them, to transfer learners to a lawful alternative education provider – having in effect just discovered that it was operating unlawfully as an independent school. Taking all these factors together, it is unlikely, therefore, that absent any aggravating features (for example concerns relating to safeguarding or continuing to operate as an independent school despite having an application to register rejected) that an ILP (which has not yet been inspected under section 97 of the 2008 Act) will face prosecution if it has taken such steps, by the start of the autumn term.

We do not propose to amend funding allocations relating to the remainder of the 2018/19 academic year in connection with this issue.

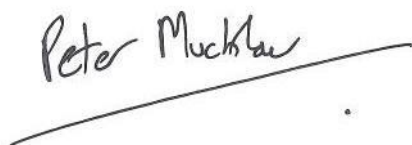
If as a result of discontinuing with provision for 14 to 16-year-olds (where applicable) it means you will be unable to deliver your 16-19 funding allocation for 2019/20, please contact the enquiry service using the [online enquiry form](#) and we will reduce your allocation accordingly.

For the 2020/21 funding year we will review the position of ILPs affected by this issue on a case by case basis. Where ILPs have acted quickly to regularise their arrangements and the process for regularising isn't complete (e.g. where an application to register is still pending) funding will continue.

What you need to do next

Please complete the form at Annex A to this letter and send it to Unregulated.SCHOOLRESPONSE@education.gov.uk by 24th June 2019.

Yours sincerely

A handwritten signature in black ink that reads "Peter Mucklow". The signature is written in a cursive style and is positioned above a horizontal line that extends to the right.

Peter Mucklow
Further Education Director
Education and Skills Funding Agency

Annex A – ILP independent school registration requirements assessment

Organisation details	
UKPRN	
Organisation Name	
Provision delivered	
Number of compulsory school age children receiving education and training at your organisation (include provision subcontracted to another organisation for this age group)	
Number of compulsory school age children have an education health and care plan (including those in subcontracted provision)	
Number of compulsory school age children are looked after by a Local Authority (including those in subcontracted provision)	
How many hours of education and training are these children receiving each week	
Implications for my organisation	
My organisation meets the definition of an independent school – if yes:	Yes / No
I will seek registration as an independent school immediately	
I will make alternative arrangements for compulsory school age children immediately	
I will change the provision offered so it does not meet the definition of an independent school	
Signatory details	
Name	
Job Title	
Contact email	
Contact telephone number	
Signature	
Date	